

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000838-MR

JAMES LEE CASH

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 86-CR-001330

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: COMBS, EMBERTON, and HUDDLESTON, Judges.

COMBS, JUDGE: James Lee Cash, *pro se*, appeals from an order of the Jefferson Circuit Court entered on March 29, 2001, dismissing his petition for declaratory judgment brought pursuant to KRS¹ 418.040. We affirm.

On August 6, 1987, Cash pleaded guilty (pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)) to three counts of attempted sodomy in the first degree and one count of sexual abuse in the first degree. He was

¹Kentucky Revised Statutes.

sentenced to a term of twenty-five (25) years' imprisonment and is currently housed at the Luther Lockett Correctional Complex.

In October 2000, Cash filed a petition for declaratory judgment, seeking an order from the circuit court to direct prison authorities to credit him with all earned meritorious good time credits and to continue to credit him with meritorious good time earned in compliance with KRS 197.045 as that statute provided on the date of his conviction. Cash argued that the amended provisions of KRS 197.045, as applied, violated the *ex post facto* clauses of the state and federal constitutions. See United States Constitution, Art. I, §9, cl. 3, and §10; Kentucky Constitution, §19. No administrative record showing a summary of Cash's application for meritorious good time credit by prison authorities was submitted to the circuit court.²

At the circuit court's prompting, the Commonwealth was eventually served with the petition and responded. Citing this court's decision in Anderson v. Parker, Ky. App., 964 S.W.2d 809 (1998), the Commonwealth emphasized that the grant of an award of meritorious good time is discretionary with the Corrections Commissioner and is therefore a "privilege" and not a "right" created by the state. The Commonwealth argued that the petition should be denied because the denial of meritorious good time credit does not implicate liberty interests as encompassed by the Fourteenth Amendment. On March 29, 2001, the circuit court

²While the Kentucky Department of Corrections was named a respondent in the petition and a certificate of service appended to the petition indicates that a copy was mailed to that agency, no response appears of record. We also note that the petition was not stamped "filed" by the circuit clerk.

summarily denied the motion and dismissed the action. This appeal followed.

In 1974, the General Assembly amended KRS 197.045 to authorize – in addition to regular good time – the award of meritorious good time of up to five days per month of incarceration for inmates performing exceptional meritorious services or duties of outstanding importance in conjunction with institutional operations and programs. The granting of an award of meritorious good time was made discretionary with the Corrections Commissioner. Policies regulating the procedural and eligibility requirements for an award of meritorious good time were duly promulgated.

In 1998, KRS 197.045 was amended to govern good time credits available to sex offenders. KRS 197.045(4) provides as follows:

Until successful completion of the sex offender treatment program, a sex offender may earn good time. However, the good time shall not be credited to the sex offender's sentence. Upon the successful completion of the sex offender treatment program, as determined by the program director, the offender shall be eligible for all good time earned but not otherwise forfeited under administrative regulations promulgated by the Department of Corrections. . . . A sex offender who does not complete the sex offender treatment program for any reason shall serve his entire sentence without benefit of good time, parole, or other form of early release. The provisions of this section shall not apply to any sex offender convicted before July 15, 1998 (Emphasis added.)

On appeal, Cash argues that the trial court erred by failing to hold that KRS 197.045(4) violates the ex post facto

clauses of the Kentucky and United States Constitution. He argues that the provision:

not only adds a condition in which good time is automatically forfeited, it eliminates [his] opportunity to be credited with good-time for clear conduct alone, and will extend his required time in prison by at least two (2) months. Memorandum in support of petition at 5.

He contends that "the requirement to enter, participate or complete the Sex Offender Treatment Program is not a requirement that was known or agreed upon during his sentencing by the Circuit Court in which he was convicted" and that he "was never instructed, informed or ordered to participate or complete this PROGRAM (sic) by his sentencing Court." Id. at 9.

We conclude that Cash does not have standing to challenge KRS 197.045(4) as unconstitutional as applied. The provision explicitly excludes inmates convicted before July 15, 1998; Cash was convicted in 1987. He has not shown how the provisions of KRS 197.045(4) operate to deprive him of any good time credit to which he is entitled. As a result, he has not satisfied his burden of establishing that the measure of punishment had changed sufficiently to qualify as an *ex post facto* violation. See California Department of Corrections v. Morales, 514 U.S. 499, 115 S. Ct. 1597, 131 L.Ed.2d 588 (1995).

Based upon the foregoing, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT *PRO SE*:

James Lee Cash
LaGrange, KY

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Tami Allen Stetler
Assistant Attorney General
Frankfort, KY